IN THE UNTIED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

HOWARD LANIER — PLAINTIFF

vs. — Civil Action No. 1:95cv206-D-D

OKTIBBEHA COUNTY HOSPITAL, et al. — DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the defendants for the entry of summary judgment on their behalf. Finding the motion well taken, the same shall be granted.

I. FACTUAL BACKGROUND[1]

This action arises out of the defendants' termination of the plaintiff's employment as a surgical technician with the Oktibbeha County Hospital. Prior to August of 1994, several complaints of petty theft were made to the administrator of the Oktibbeha County Hospital, Arthur C. Kelly. The complaints centered around the theft of small amounts of cash from the surgical suite of the hospital. With the hope of catching the culprit on film, Mr. Kelly engaged Day Detectives, Inc., of Tupelo, Mississippi to install a hidden video surveillance camera in the vicinity of the surgical suite. In addition, Mr. Kelly requested that Dr. Joe Bumgardner leave a specific amount of cash in his wallet and leave the wallet in his unlocked surgical suite locker. Dr. Bumgardner complied, and on the morning of August 4, 1994, left the total amount of twenty five dollars ($25.00) in his wallet. He placed the wallet in the pocket of his lab coat, and left both wallet and lab coat in his unlocked locker.

Later that day, Dr. Bumgardner checked on his locker and found that $11.00 was missing from the money he had placed in his wallet. Dr. Bumgardner then reported the theft to Kelly.

[1] In ruling on a motion for summary judgment, the court is not to make credibility determinations, weigh evidence, or draw from the facts legitimate inferences for the movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rather, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255. The court's factual summary is so drafted.

Review of the video tape for the interim period revealed that two individuals came into contact with Dr. Bumgardner's locker. The first individual is a white male, Roy Jackson, Jr. Jackson is shown removing the padlock from the locker and later opening the locker, commenting that Dr. Bumgardner had "cleaned his locker out." Exhibit "2" to Defendants' Motion, Edited Videotape of Surveillance Camera. Mr. Jackson did not, however, reach into the locker or remove anything from inside it.

The second individual is a black male - the plaintiff Howard Lanier.[2] The videotape shows Lanier removing Dr. Bumgardner's wallet from the locker, moving beyond camera range and several minutes later returning the wallet to the locker. No other individuals are reflected on the videotape as having any contact with Dr. Bumgardner's locker except the doctor himself. Based on the videotape, the hospital suspended both Jackson and the plaintiff from their jobs with the hospital, and both were then arrested and charged with burglary.

Both Jackson and the plaintiff requested polygraph examinations concerning the theft. Jackson was examined on August 8, 1994, by representatives of the Tri-County Drug Enforcement Agency. The polygraph examiner, Robert C. Jennings, was of the opinion that Jackson was not deceptive in his denials of involvement. The plaintiff also appeared for examination on that day, but refused to submit to the exam until he consulted with counsel. He did so, and submitted to an examination on August 23, 1994. Robert C. Jennings also administered this exam, and was of the opinion that the plaintiff was deceptive in his negative answers to the following questions:

> Did you steal $11.00 from Dr. Bumgardner's locker?
>
> Did you steal anything from any of the lockers?
>
> Did you plan or conspire with anyone to steal anything from the lockers?
>
> Do you know for sure who stole the money from the locker?

Exhibit "A(2)" to Defendants' Motion, 8/23/94 Letter from Robert Jennings to George Carrithers. After receiving the opinions of Robert Jennings concerning the examinations, the hospital allowed

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[2] Lanier admitted in his deposition that this individual as depicted on the videotape is in fact him. Exhibit "D" to the Defendants' Motion, Excerpts from the Deposition of Howard Lanier.

Jackson to return to work but terminated the plaintiff's employment.

Additionally, the hospital dropped the criminal charges against Jackson prior to trial,[3] but proceeded to pursue the charge of burglary against the plaintiff. A bench trial on the charge was conducted on April 24, 1995, before Oktibbeha County Justice Court Judge Alton Gillis. Judge Gillis could not determine beyond a reasonable doubt that Lanier was the person on the tape who removed Dr. Bumgardner's wallet from the locker,[4] and acquitted him of petty larceny. After his acquittal, the plaintiff sought reinstatement of his position with the hospital. The hospital refused, and this action followed.

The plaintiff originally filed this action on June 22, 1995, alleging claims under 42 U.S.C. §§ 1981, 1983, 2000-e(2). In addition, the plaintiff alleged the Mississippi state law tort of intentional infliction of emotional distress. The defendants have now moved for the entry of summary judgment on the plaintiff's claims.

II. DISCUSSION

1. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317,

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[3] Jackson testified as follows with regard to why he was in contact with the locker on the day in question:

Q: All right. Why did you open the locker door?
A: Just to look in there and see how many blue towels that Mr., I mean, Dr. Bumgardner had. It was basically a joke in surgery.
Q: Why?
A: Because Dr. Bumgardner was always, he would always take any blue towel or lap sponges off your back table. And we used to just kind of hide them or hoard them, or whatever, just so that we could get some of them ourselves. And it was kind of a running joke with, "Well, how many does Dr. Bumgardner have this time?" And I opened the locker.
Q: Did you reach inside the locker?
A: No, sir.

[4] But see note 2, supra. The court notes that the plaintiff did not testify at the Justice Court trial, and the plaintiff's deposition in this matter was not taken until January 8, 1996.

325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

2. THE PLAINTIFF'S CLAIMS

A. MULTIPLE CLAIMS BASED UPON RACE DISCRIMINATION

The plaintiff charges that his termination and the hospital's refusal to rehire him after his acquittal constitute race discrimination, violating federal law in several respects. Particularly, the plaintiff charges in his complaint that this activity violates 42 U.S.C. §§ 1981, 1983[5] and 2000-e. Regardless of the particular statutory protection of civil rights under which the plaintiff seeks to assert his claims of race discrimination, the applicable standard is the same. Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1047 (5th Cir. 1996); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1284 n.7 (5th Cir. 1994); Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) ("When [§ 1981 and § 1983] are used as parallel causes of action with Title VII, they require the same proof to show liability."). As the applicable standard is the same, the court need only address the plaintiff's claims under the most common vehicle for relief of discriminatory employment actions - Title VII.

B. RACE DISCRIMINATION

For the plaintiff to establish his claim of race discrimination in employment, the three-tier

[5] The plaintiff also separately asserts claims under the Fourteenth Amendment and the Equal Protection clause of the United States Constitution. As these claims are properly encompassed under his § 1983 claim, the court will not afford them additional discussion.

McDonnel-Douglas standard is utilized: 1) the plaintiff must establish a *prima facie*[6] case of discrimination, 2) the burden then shifts to the defendant to articulate a legitimate and nondiscriminatory reason for its actions, and 3) the burden returns to the plaintiff to prove that the proffered reason was a mere pretext for discrimination and that the real reason was to discriminate. McDonnel-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Polanco v. City of Austin, 78 F.3d 968, 976 (5th Cir. 1996); Marcantel v. Louisiana Dep't of Trans. & Dev., 37 F.3d 197, 199 (5th Cir. 1994). In the case at bar, the defendants concede that there are genuine issues of material fact as to whether or not the plaintiff can establish a *prima facie* case of discrimination. Defendants' Brief, p. 11. However, the defendants argue that the plaintiff is unable to produce evidence of discrimination that would entitle him to avoid summary judgment on the remaining elements of the McDonnel-Douglas analysis.

The fact that a plaintiff may establish his *prima facie* case does not necessarily mean that he may avoid summary judgment on his discrimination claims. LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 450 (5th Cir. 1996); Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 993 (5th Cir. 1996). Rather, to avoid the grant of a properly made motion for summary judgment, a plaintiff must ultimately present evidence sufficient to create a reasonable inference of discriminatory intent. LaPierre, 86 F.3d at 450.

> [A] jury issue will be presented and a plaintiff can avoid summary judgment . . . if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which the

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[6] In order to establish a *prima facie* case in a claim of disparate treatment, the plaintiff must show:

1) he was a member of a protected class;
2) he was qualified for the position that he held;
3) he suffered an adverse employment decision; and
4) the plaintiff's employer replaced him with a person who is not a member of the protected class, or in cases where the employer does not intend to replace the plaintiff, the employer retains others in similar positions who are not members of the protected class.

Meinecke v. H & R Block Income Tax Sch., Inc., 66 F.3d 77, 83 (5th Cir. 1995); Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 596 (5th Cir. 1992); Thornbrough v. Columbus & Greenville R. Co., 760 F.2d 633, 642 (5th Cir. 1985) (citing Williams v. General Motors Corp., 656 F.2d 120, 129 (5th Cir. 1981)), cert. denied, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982).

plaintiff complains.

Id. (citing Rhodes, 75 F.3d at 994).

Most important to the court's determination is what the defendants knew at the time of the termination. Prior to the employment decisions in question in this case, the defendants had possession of the videotape depicting a person they believed to be the plaintiff taking Dr. Bumgardner's wallet from the locker. Additionally, the defendants were aware that a polygraph examiner had expressed an opinion that the plaintiff was deceptive in his denials of involvement in the theft.

The plaintiff, in his submissions to the court, puts great weight on the plaintiff's acquittal of criminal charges in this matter. Indeed, Mr. Lanier would have this court declare his acquittal carries preclusive weight:

> [T]he plaintiff would show that the Doctrine of Res Judicata and the Doctrine of Collateral Estoppel bar the Defendants from raising any issue with respect to any facts and circumstances surrounding the alleged theft that was committed by the plaintiff, Howard Lanier . . .

Plaintiff's Response, p.2. Even if this court were to find that the acquittal was empowered with preclusive effect,[7] the court's relevant inquiry is not upon the plaintiff's guilt or innocence of the charge of theft. The defendants' reasonable belief of theft by the plaintiff is sufficient to provide them with a legitimate and nondiscriminatory justification for their actions which Mr. Lanier must overcome with sufficient evidence of discrimination. That the defendants did not agree with Judge Gillis' ruling is neither illegal nor unreasonable, considering both the differing burden of proof in a criminal trial as well as evidence not presented at the criminal trial - namely the results of the

[7] The court does not understand how this state court acquittal would carry such preclusive effect in this case. The difference in the burdens of proof between civil and criminal actions alone prevents such a finding, and the United States Supreme court has repeatedly held that "[i]t is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel" of a criminal acquittal in a civil context. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 361, 79 L.Ed.2d 361, 104 S.Ct. 1099, 1104 (1984); see also Dowling v. United States, 493 U.S. 342, 342, 107 L.Ed.2d 708, 110 S.Ct. 668, 669 (1990); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 234, 34 L.Ed.2d 438, 93 S.Ct. 489, 491 (1972).

polygraph examination.[8] Ultimately, the only evidence of race discrimination that the plaintiff can produce is that a white employee also suspected of involvement in the theft was later rehired while he was not. Considering the disparity of proof against the plaintiff and Mr. Jackson regarding the theft, this court is of the opinion that no reasonable juror would find in the plaintiff's favor based upon this evidence alone. In comparison to the more damning evidence of theft against the plaintiff, the evidence against Mr. Jackson was that while opening the locker in question, he never reached inside of it or removed items from it. Further, he "passed" a polygraph examination on the subject. There is no evidence before the court that would demonstrate that the defendants were unjustified in relying upon the results of Mr. Jennings' polygraph examinations of either the plaintiff or Mr. Jackson.

When faced with a properly supported motion for summary judgment, the plaintiff has failed to produce sufficient evidence of discrimination to prevail on his claim. There is no genuine issue of material fact as to the plaintiff's claims of race discrimination, and the defendants are entitled to the entry of a judgment as a matter of law. The defendants' motion for summary judgment shall be granted as to these claims.

C. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The plaintiff has also asserted a state law claim for the intentional infliction of emotional distress. The parties' submissions on the present motion are silent as to this claim. Nevertheless, as all of the plaintiff's federal law claims are being dismissed, the court declines to exercise its pendent jurisdiction over this claim. It shall also be dismissed. See, e.g., Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1070 (5th Cir. 1994); Noble v. White, 996 F.2d 797, 799 (5th Cir. 1993); Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580 (5th Cir. 1992).

III. CONCLUSION

Upon consideration of the defendants' motion in this cause, the court finds that the plaintiff

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[8] However, as the plaintiff's deposition was not taken until after the institution of this lawsuit, Lanier's admission to taking Dr. Bumgardner's wallet from the locker does not add weight to the defendant's case.

cannot maintain his action for race discrimination. The plaintiff has simply failed to present sufficient evidence that would convince a reasonable juror to rule in his favor. In addition, as all of the plaintiff's federal law claims are being dismissed, this court declines to continue to exercise pendent jurisdiction over the plaintiff's state law claims.

A separate order in accordance with this opinion shall issue this day.

This the ___ day of September 1996.

United States District Judge

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ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the defendants' motion for summary judgment is hereby GRANTED;

2) the plaintiff's claims in this matter arising under federal law are hereby DISMISSED;

3) the plaintiff's claims in this matter arising under state law are hereby DISMISSED WITHOUT PREJUDICE; and

4) this case is CLOSED.

All memoranda, depositions and other matters considered by the court in granting the defendants motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this the ___ day of September 1996.

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United States District Judge